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THE PROXIMATE CONSEQUENCES OF AN ACT

I

"*IN jure non remota causa sed proxima spectatur.* It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."[1] The meaning of this maxim of Bacon is not clear. In medieval legal and philosophical Latin the word *causa* had four meanings: a thing or circumstance; a reason or excuse; a creative antecedent; a lawsuit. Of the examples given by Bacon to illustrate his maxim, not one is unmistakably a cause in the third sense; most of them are examples of the first meaning, and are to the effect that we do not look behind the immediate circumstances of an act to determine its nature. He allowed two exceptions: in case of "covenous acts" and of crimes. The former came before the chancellor, who was called upon by the terms of the bills to investigate precedent facts; and the example given of the latter was proof of the motive (a precedent cause in the second sense) to qualify the act.

Bacon was entirely familiar with the Aristotelian division of causes into four: the formal, the efficient, the material, and the final. He distinguishes these with respect to their importance.[2]

[1] BACON, MAXIMS, 1.

[2] 2 NOV. ORG. APHOR., 2.

The *final* cause, that is, the creative purpose, he says, "rather corrupts than advances the sciences, except such as have to do with the science of human action." The *formal*, that is, the result imaged by the creator, "is despaired of." There remain the *efficient*, that is, the active force, and the *material*, the passive condition upon which the active force works. These, he says, if they can be discovered only after investigation, are remote,[3] and "contribute little, if anything, to true and active science." [4]

In both passages Bacon seems to have the same thing in mind. He is combating the metaphysical tendency to go behind everything, and to find labored explanations for matters in themselves most simple; and he says that the law, having found the immediate physical causation, will not use metaphysical subtlety to distribute this causation among obscure distant antecedents. To use a modern analogue, if the law finds a man committing murder it will hold him for it, without taking time to find whether heredity or environment may not be more to blame than himself. Thus explained, the maxim is evidently not concerned with the modern problems of proximity or remoteness of result.

That Bacon's First Maxim was not recognized by lawyers before his time is clear from his examples. That lawyers for two hundred years after his time were uninfluenced by it seems clear from the authorities. No title, *proximate cause*, is found in any of the abridgments or digests before the end of the eighteenth century, nor has any reference to the maxim been noticed in any case before that time.

Meanwhile, however, the courts had been forced to deal with the problem of "consequential damage." It was enough at first

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[3] "Quales quaeruntur et recipiuntur, remotae scilicet."

[4] My learned colleague, Dean Pound, points out that Bacon was in this case combating the Aristotelian metaphysic, with its final cause; as Bacon says in another place, the physical causes are the efficient and material, the metaphysical are the formal and final causes. iii. DE AUG. SCI., 4. Fowler, Bacon's best and most sympathetic editor, points out his insistence upon the physical cause, 1 FOWLER'S BACON'S NOV. ORG., 2 ed., 65, note 40, and finds in his opposition to the "remote cause" an example of his opposition to the theological and metaphysical form of reasoning — in other words, of the modern rather than the medieval turn of his mind. 2 FOWLER'S BACON'S NOV. ORG., 2 ed., 2, note 13. Bacon's idea of the remote cause, therefore, was a purely physical idea; and he framed or found in the schools a maxim expressing the modern feeling, and asserted its truth in law; seeking for confirmatory examples in the Abridgments, and being perforce content with obscure, not to say remote, ones.

to say, as Lord Holt did in *Roswell* v. *Prior*,[5] that "he that does the first wrong shall answer for all consequential damages." But it soon became evident that this responsibility must be somehow limited. The courts in laying down their limits were not agreed on the principle. While in *Ashley* v. *Harrison*[6] Lord Kenyon had said "the injury complained of was too remote," we find the idea expressed a few years later by Lord Ellenborough in *Vicars* v. *Wilcocks*[7] in the *dictum* that "the damage must be the legal and natural consequence of the words spoken." The first occurrence of the word "proximate" which has come to my attention — doubtless there were others earlier — was in the argument of counsel in *Ward* v. *Weeks*[8] many years later, where Sergeant Wilde said, "a man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from some intermediate agent." Greenleaf in the early forties, in his "Evidence," first clearly stated this principle in America: "The damage to be recovered must always be the *natural and proximate consequence* of the act complained of." [9]

One or two points may be noted here. First, there is in these cases no reference to Bacon's maxim; the earliest reference to this maxim which the author happens to have seen in any decision (doubtless there were earlier ones) was in *Scott* v. *Hunter*.[10] On the other hand, in many cases in which the subject was discussed at length the maxim was not mentioned.[11] It was reprinted in Broom's Maxims.[12] Second, that the court is here concerned with the

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[5] 12 Mod. 636, 639. "Every one who does an unlawful Act, is considered as the Doer of all that follows." De Grey, C. J., in Scott *v.* Shepherd, 2 W. Bl. 892, 899 (1773).

[6] 1 Esp. 48 (1793). [7] 8 East, 1 (1806). [8] 7 Bing. 211, 212 (1830).

[9] 2 Greenl. Ev., 1 ed., 258 (1848). In Guille *v.* Swan, 19 Johns. (N. Y.) 381, 383 (1822), the Supreme Court of New York said: "Now, if his descent . . . would, ordinarily and naturally, draw a crowd . . . all this he ought to have foreseen, and must be responsible for."

[10] 46 Pa. 192 (1863).

[11] Harrison *v.* Berkley, 1 Strob. L. (S. C.) 525 (1847); Denny *v.* New York Central R. R., 13 Gray (Mass.) 481 (1859); Gilman *v.* Noyes, 57 N. H. 627 (1876); Clark *v.* Chambers, 3 Q. B. D. 327 (1878).

[12] London, 1845; reprinted in Philadelphia in the widely used "Law Library." The fact that the earliest references in this country to the maxim are in Pennsylvania may perhaps be explained by the publication there of the American edition of Broom. According to Broom, the maxim had received no general application, but was "almost exclusively applied to" marine insurance.

consequences of an act, not with its cause; in very few cases up to the year 1900 is the proximity of the *cause* the subject of investigation. Third, that the courts do not use the word *proximate* alone, but in some combination, usually *natural and proximate.*

We have, then, to deal with a modern and gradually emerging principle that a person is responsible for the consequences of his act, but that responsibility is limited to such consequences as bear some sort of relation to the act. The serious study of this question by the courts has occurred only during the last fifty years; and by legal authors only very recently. The summing up of the doctrine theretofore developed by Judge Smith in an earlier volume of the HARVARD LAW REVIEW [13] represents the most thorough examination of the subject yet made; and it is a rather striking fact that he ends where Bacon began: that the only "legal cause" is the efficient cause. It is submitted, however, that the matter cannot permanently be left there. Judge Smith himself did not regard his painstaking and scholarly work as final, but desired that his discussion should be the basis of further investigation. If it is true, as all agree, that the limitation of legal investigation to proximate cause or consequence is due to the impossibility of the court making a complete investigation and thus doing complete justice, the court, through some definite principle of law, should determine the general limits of proximity, and not leave it at large to the jury. It is the purpose of this article to suggest certain more definite principles of law by which the determination of proximity is to be regulated.

II

The natural method of applying Bacon's maxim would be, to start with the consequence and work back to the cause. But as the law has actually developed, the method is reversed: we start with the human act and trace its consequences into a cause of action, and then trace further its consequential damage. This is a much simpler task. The causes of an event are all the preceding circumstances which brought the event to pass; and they are myriad. The consequences of an event, however, which still remain "efficient" are very few, and may easily be handled in an investigation.

[13] 25 HARV. L. REV. 103, 223, 303.

The starting-point of any investigation of legal liability is some act or some non-action of a human being. But whereas an actor may always rightly be held to answer for the consequences of his act, since he has taken it upon himself to change the course of events, it is otherwise with a non-actor; he should be held responsible only if his failure to act was in itself a legal wrong, that is, if he had a duty to act. The non-action of one who has no legal duty to act is nothing. It does not alter the course of events, and therefore it has no consequences. It is true that the omission of a legal duty also does not alter the course of events; but the non-actor, having been obliged by law to change events, is rightly held responsible for the consequences of not doing so.

Starting with a human act, we must next find a causal relation between the act and the harmful result;[14] for in our law — and, it is believed, in any civilized law — liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.

Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina* v. *Dalloway*[15] it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses

[14] Chicage, R. I. & P. Ry. *v.* Guthridge, 179 Pac. (Okla.) 590 (1919). This causal relation must be established by evidence, like any other part of the case. Ross *v.* Smith, 182 Pac. (Wash.) 582 (1919).

[15] 2 Cox C. C. 273 (1847).

ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.[16]

This principle is illustrated by several recent cases. In *Piqua* v. *Morris*,[17] the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford* v. *Trident Fisheries Co.*[18] where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved. Similarly in *Gutman* v. *Bronx Borough Bank*,[19] where plaintiff sent a check to her broker to keep good her margin on a falling stock, and defendant wrongfully refused to cash it, whereupon she was sold out, the court refused recovery unless it could be shown, by the course of the market, that otherwise she would not have lost both stock and check.[20]

It has been seen that an act which in no degree contributed to the result in question cannot be a cause of it; but this, of course, does not mean that an event which *might* have happened in the same way though the defendant's act or omission had not occurred, is not a result of it. The question is not what would have happened, but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death. A man would have died from a small dose of poison; yet if he was given twice as much, the entire amount of poison given him was a cause of his death.

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[16] Sowles *v.* Moore, 65 Vt. 322, 26 Atl. 629 (1893).

[17] 98 Ohio St. 42, 120 N. E. 300 (1918). See to the same effect Montgomery L. & W. P. Co *v.* Charles, 258 Fed. 723 (1919), where, however, the negligent act which was held not to have affected the result was one of commission.

[18] 122 N. E. (Mass.) 389 (1919).

[19] 188 App. Div. 664, 177 N. Y. Supp. 173 (1919).

[20] See also McMahon *v.* Western Union Co., 171 N. W. (Ia.) 700 (1919); Whitney *v.* Northwestern Pacific R. R., 178 Pac. (Cal.) 326 (1919).

Furthermore if two persons are active in bringing about a result, either by act or by wrongful omission, each act or omission is no less a cause of the result because the result might have happened exactly as it did though one of the persons had not acted, the cause attributable to the other having been sufficient to bring about the result. One might have caused the result, but in fact both did so. Thus where several persons, owning separate oil-wells, allowed oil to escape into a creek, where it became ignited and eventually burned plaintiff's building, each owner is a cause, and if the result is proximate all are equally liable.[21]

A result is none the less attributable to the defendant's act or omission because it was followed or accompanied by a wrongful omission on the part of some one else. Thus, if it is the duty of two persons to do a thing and neither does it, the resulting injury is attributable to either failure.

Defendant had a duty to ventilate a mine; it was another's duty to inform him of any need for ventilation. Plaintiff was injured by lack of ventilation; the injury was a result of defendant's failure.[22]

Defendant was bound to supply a dry floor for workmen; another was employed to dry the floor by sanding. The floor being wet and not sanded, plaintiff slipped and was injured; this was the result of defendant's failure in duty.[23]

Defendant was bound to transmit a telegram to H asking for information for plaintiff; H was under an independent obligation to send the information and did not do so. Plaintiff's failure to get the information was due to defendant's failure to transmit the telegram.[24]

Defendant by his policy was responsible to plaintiff for loss of his vessel by perils of the sea. A seaman carelessly left a sea-cock open and the water coming in through it sank the vessel. The loss was by peril of the sea.[25]

III

Granting that a certain event was the result of, that is was caused by, a human act, the court will not necessarily follow the

[21] Northup *v.* Eakes, 178 Pac. (Okla.) 266 (1919); Mummaw *v.* Southwestern Tel. & Tel. Co., 208 S. W. (Mo. App.) 476 (1918). The contrary decision in Gay *v.* State, 90 Tenn. 645, 18 S. W. 260 (1891), must be regarded as unsound.

[22] Reg. *v.* Haines, 2 C. & K. 368 (1847).

[23] Harwell *v.* Columbia Mills, 98 S. E. (S. C.) 324 (1919).

[24] Western Union Tel. Co. *v.* Huffman, 208 S. W. (Tex. Civ. App.) 183 (1919).

[25] Clarke *v.* Mannheim Ins. Co., 210 S. W. (Tex. Civ. App.) 528 (1919).

act into the result in question. The consequences of an act may be innumerable; to trace them would require infinite time and patience. Here, as in all affairs of life, it is necessary to reach a result which will secure to each interest the greatest amount of consideration which is compatible with an equal consideration to all other interests. To apply this principle to the question under discussion, the court can give to the tracing of the consequences of any particular act only its fair share of all the available time, considering the other acts which are waiting its attention. If, for instance, the court is called on to investigate the dropping of some substance, the court will watch it while it falls through the air; it will continue to watch it after it has fallen into an unstable or dangerous position; but as soon as it has reached a safe and stable rest the court will turn away to the investigation of some other act.[26] Its time is too short to spend in investigating apparently safe situations further. To use the common language in which this is expressed, the court will trace an act into its proximate but not into its remote consequences.

The rule that requires the exclusion of remote consequences is therefore a fundamental principle of law, based on the necessity of doing justice to all; and the question in any particular case, whether a given result is remote, is purely a question of law. This of course does not mean that the jury has no part in the determination of the question, which always involves the application of the law to facts, often quite complex. Particularly where the defendant's connection with the result is on the passive side the determination of the question involves the settlement of inferences of fact which are seldom so clear that the court can take the question away from the jury. But the rule of law which is to be applied to the facts must always be found by the court and given by it to the jury.

This question has proved a puzzling one to courts and lawyers. It has already been seen that it first presented itself as a question of the limitation of consequences allowed to be considered; it became later confused with Bacon's maxim concerning "the impulsion of cause on cause," and a more serious confusion with negligence has frequently been noticed. The series of articles by Judge Smith greatly simplified the problem; a study of the subject as developed

[26] Rex *v.* Gill, 1 Stra. 190 (1719).

in criminal as well as civil cases has thrown light on the subject; and a conclusion as to the principles of law may be suggested. It is purposed in this article to suggest such principles, and to illustrate them largely by the cases decided in the last year and a half; so that this article in fact concerns itself with "the progress of the law" in the subject under consideration.

The study of proximate causation will prove to be a study of activity of force or of risk. A result is usually created by the impulsion of an active force upon a passive force; not necessarily, for it may be created by two active forces acting on each other, as by a head-on collision on a railway. Usually, however, but one active force is employed in bringing about a result. One active force at least is necessary, since nothing but an active force can bring about that change of conditions which we call a consequence. Furthermore, in so far as a passive force is traceable to a man it must be either (1) because that man caused it by an act which was an active force, the passive force being the spent form of the active force, or (2) because that man violated a duty to act upon it by an active force which he failed to apply. The whole problem may therefore be stated thus: when is one responsible for the operation (*a*) of an active force which he has created; (*b*) of an active force which acts upon a passive force which he created, or upon a passive force which he was legally bound to change. Each time one or more active causes operate on a condition to create a new condition, a new causal step is taken, ending with the given result. This result is the direct result of the active force or forces which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. The active force which brings about the result without the intervention — the subsequent coming into action — of any other force is a direct cause of the result. All other forces are indirect. Every condition of what might be called the set stage on which the last active force acted is a precedent force; and of course no precedent force can operate to make a subsequent force remote.

We may therefore begin our investigation with the assumption that the immediate result of an active force is primarily the proximate result; and that if the principle of proximity is discoverable, it must be by some method of relating the defendant's act to the final active force. This final active force must be *prima facie* the

"efficient" cause which Judge Smith in the article cited describes as proximate.

What, then, do we mean by proximity of result? Is the meaning a result that is physically direct, direct in time or place? Or is it logically direct, direct in causal sequence? There have been courts which urged the former view. The Court of Appeals in New York, in a series of cases dealing with the spread of fire, beginning with the Ryan case,[27] set a spacial limit to proximity of result. So eminent and sound a lawyer as Judge Cardozo felt obliged to assent to this view in a late case.[28] The case itself did not involve proximity of causation, but the interpretation of an insurance policy. In the course of his interpretation the learned judge discussed the earlier authorities in the state on the subject of causation, and added that the view of causation there expressed, and apparently accepted by him,

"shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does."

It is submitted, with great deference (for Judge Cardozo is one of the author's judicial idols), that there is no such pragmatic sanction for the law of proximate causation. The passage is spoken entirely *obiter*, since the question was, whether a certain loss was covered by a policy of fire insurance. If we look elsewhere than to New York, we find no support for the theory of spacial proximity. Thus in fire cases the doctrine of the Ryan case has been frequently repudiated;[29] and in no other class of cases has it even been suggested. In one case[30] a person sent poisoned candy by mail from California to Delaware, where it was eaten by the victim; no difficulty was felt in holding the California sender to be the cause of death, though cause and effect were a continent apart. The argument that there must be proximity in time has no greater force.

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[27] Ryan *v.* New York Central R. R., 35 N. Y. 210 (1866).

[28] Bird *v.* St. Paul F. & M. Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918).

[29] Smith *v.* London & S. W. Ry., L. R. 6 C. P. 14 (1870); Kuhn *v.* Jewett, 32 N. J. Eq. 647 (1880); Hoyt *v.* Jeffers, 30 Mich. 181 (1874); Milwaukee & S. P. Ry. *v.* Kellogg, 94 U. S. 469 (1876).

[30] People *v.* Botkin, 132 Cal. 231, 64 Pac. 286 (1901).

Thus, in a late case[31] it was held that under the statute of Pennsylvania an action for death could be maintained although the accident which caused the death happened ten years before it; the connection between act and result being otherwise uninterrupted. It must be clear that the proximity called for by the principle under discussion is proximity in causation; too many new causes must not intervene between the human act and the result under consideration.

What, then, is this proximity in causation? For understanding it, a little consideration of causal action may prove useful. Take a given situation: forces quiescent, forming a general condition of affairs, what might perhaps be called a set stage. Into this condition a new active force is interjected, creating a rearrangement of affairs, a change of condition, a new event, which we call a result. This is the first step in causation. If, then, a second active force comes upon the scene, causing a new result, this second result is the indirect, not the direct, result of the first active force considered. Or, to vary the case, suppose upon the set stage another active force is working, whether prior to or concurrently with the force we are dealing with, the latter active force operates together with the others in bringing about the result, which is still direct.

The connection of the defendant with the final active force may be sought in two ways. His connection with it may have been an active one; either by himself bringing it into existence, or by causing another person to do so. On the other hand, the defendant may have acted, and the force thereby loosed may have spent itself, coming to equilibrium in the form of a condition of forces which may or not be stable. If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line. The same thing may be said if the defendant whose duty it was to change a condition which was in danger of such an oncoming force failed to remove the condition; in that case also he comes into a causal relation with the new force.

Our further discussion will accordingly fall into two heads: first, where the defendant's connection with the final active force con-

[31] Western Union Tel. Co. *v.* Preston, 254 Fed. 229 (1918).

sisted in creating or causing it; second, where the defendant created a condition upon which the final force directly acted. To the consideration of the cases grouped in these two classes we now proceed.

IV

Since, as we have seen, the closest causal connection possible is that between an active force and its direct result, whatever consequences may be proximate certainly this one must be. It is well settled, therefore, that a direct result of an active force is always proximate. Several classes of cases illustrate this principle:

(*a*) Injury direct and immediate, but unforeseeable.

The defendant assaulted the victim; the victim had heart disease, and died of fright. Defendant is the direct and proximate cause of the death.[32]

Fire against which defendant had insured short-circuited a machine, and thus caused such rapidity of action as to wreck the machine. The fire was a direct and proximate cause of the injury.[33]

(*b*) Injury caused by direct transmission of defendant's force, as by one brick in a row being caused to fall upon the next until the last brick is thrown down.

Defendant with his tug wrongfully ran against a pile in the river; the force was transmitted through intervening piles until it threw out a brace to keep two piles apart, and plaintiff's leg was caught between these two piles. This was the direct and proximate result of defendant's act.[34]

Defendant's automobile wrongfully collided with a pushcart and threw it against plaintiff, injuring her; the result is direct and proximate.[35]

A negligent collision of defendant's car with another car threw a standing passenger against plaintiff and injured him; this was a direct and proximate result of the collision.[36]

(*c*) Injury caused by the aggravation of a preëxisting disease or unhealthy condition.

Where a latent disease was aggravated by defendant's act, the act is the direct and proximate cause of the entire result.[37]

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[32] State *v.* O'Brien, 81 Ia. 88, 46 N. W. 752 (1890).

[33] Lynn G. & E. Co. *v.* Meriden Ins. Co., 158 Mass. 570, 33 N. E. 690 (1893).

[34] Hill *v.* Winsor, 118 Mass. 251 (1875).

[35] Solomon *v.* Branfman, 175 N. Y. Supp. (Misc.) 835 (1919).

[36] Mathews *v.* Kansas City Railways, 104 Kan. 92, 178 Pac. 252 (1919).

[37] Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403 (1891); Hahn *v.* Delaware, L. & W. R. R., 92 N. J. L. 277, 105 Atl. 459 (1918).

Where plaintiff was peculiarly susceptible to poisoning, his serious injury from poison to which his master's act illegally subjected him is the direct and proximate result of the master's act.[38]

(*d*) Injury caused through the creation and later development of a septic or diseased condition.

Where the injury causes septic changes in the body, there being no new outside force concurring, the resulting harm is a direct and proximate consequence of the injury.[39]

In one important class of cases, however, the courts seem to have held the opposite view. Where defendant negligently caused a physical injury, the immediate effect of which was the insanity of the injured person, who in a fit of insane mania committed suicide, the death is held not to be a proximate result of the injury.[40] This opinion seems hardly reconcilable with the current of authority on this subject.

(*e*) Injury caused through the subsequent action of already operating natural forces.

The defendant, a master of a vessel, carelessly missed stays in a high wind and flood tide, and the wind and tide carried his vessel against a sea wall and injured it; defendant's negligent act is proximate cause of the injury to the wall.[41]

It is to be noticed that the direct result of a *passive* cause is not necessarily proximate; proximity of result following primarily the active line. So where a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not to be a proximate cause of the collision, but "only a condition." [42]

Plaintiff through defendant's fault fell through a trestle and was rendered unconscious; while he was unconscious he contracted typho-malaria, there prevalent, and died of it. The court held defendant liable, but it would seem that his negligence was not direct but that other circumstances caused proximity.[43]

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[38] Louisville & N. R. R. *v.* Wright, 183 Ky. 634, 210 S. W. 184 (1919).

[39] Development of septicemia: Armstrong *v.* Montgomery St. Ry., 123 Ala. 233, 26 So. 349 (1899). Development of carbuncle followed by septic infection: Day *v.* Great E. C. Co., 104 Wash. 575, 177 Pac. 650 (1919). Development of tuberculosis: Pullman Co. *v.* McGowan, 210 S. W. (Tex. Civ. App.) 842 (1919). Development of tuberculosis: Clarke *v.* New A. C. Co., 179 Pac. (Cal.) 195 (1919).

[40] Scheffer *v.* Washington C. V. M. & Ct. S. R. R., 105 U. S. 249 (1881).

[41] Romney Marsh *v.* Trinity House, L. R. 5 Ex. 204 (1870).

[42] Gilman *v.* Central Vermont Ry., 107 Atl. (Vt.) 122 (1919).

[43] Terre Haute & I. R. R. *v.* Buck, 96 Ind. 346 (1884).

Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force. In such a case the defendant's force is really continuing in active operation, by means of the force it stimulated into activity.

(*a*) The simplest case of this sort would be an effective request to the intervening party to act, as in the typical case of A employing B to kill C, or of A commissioning B to make a contract with C. The defendant published a newspaper, in which he printed an advertisement of obscene literature for sale. X ordered the literature in response to the advertisement. Defendant is a proximate cause of the sale.[44]

Defendant made a political speech in the street; persons crowding to hear him climbed upon a pile of paving-stones and injured them. Defendant was a proximate cause of the injury.[45]

(*b*) Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant.

Defendant shot a dog in front of its owner's house; the dog ran frightened into the house and knocked down a woman. The injury to the woman was a proximate result of the defendant's act.[46]

Defendant, driving a sleigh, ran into a horse attached to another sleigh; the horse bolted and struck the plaintiff. Defendant is a proximate cause of the injury to plaintiff.[47]

Defendant by threats of violence drove his wife through the house until she jumped out of the window; he was a proximate cause of the injury thereby resulting to his wife.[48]

Defendant while making a street speech violently abusing a certain form of religion, caused the adherents of that form of religion to make an attack upon him, in the course of which some of his auditors were hurt; his act was a proximate cause of the injury.[49]

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[44] Rex *v.* De Marny, [1907] 1 K. B. 388 (1906).

[45] Fairbanks *v.* Kerr, 70 Pa. 86 (1871).

[46] Isham *v.* Dow, 70 Vt. 588, 590, 41 Atl. 585 (1898). Rowell, J., said: "The law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or not the probable consequence of the act, for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events."

[47] McDonald *v.* Snelling, 14 All. (Mass.) 290 (1867).

[48] Reg. *v.* Halliday, 61 L. T. R. 701, 702 (1889). Lord Coleridge, C. J., said: "If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result."

[49] Wise *v.* Dunning, [1902] 1 K. B. 167 (1901). Compare Beatty *v.* Gillbanks, 15

The defendant by his act may put some one in danger of loss (or of further loss), and that person may thus be caused to act defensively; the direct result of this defensive act is a proximate result of defendant's act. The intervening actor is usually the person whose rights are endangered by defendant's act.

Defendant threw a lighted squib into a crowd; as it was about to hit one in the crowd he threw it away from himself, and it exploded near plaintiff and put out his eye. Defendant was a proximate cause of plaintiff's injury.[50]

Defendant negligently sent out a coach with insufficient harness; a rein broke, and the horses ran. Plaintiff, reasonably believing that the coach was about to capsize, jumped to the ground and was hurt. Defendant was a proximate cause of the injury.[51]

Defendant wrongfully took plaintiff's horse and wagon; plaintiff spent time and money in looking for his property. This expense was a proximate result of defendant's act.[52]

Defendant wrongfully placed an obstruction across that part of a road used as a carriage-road; some one to clear the road removed the obstruction to the footpath; plaintiff, using the footpath in the dark, ran against the obstruction and was injured. This was a proximate result of defendant's act.[53]

Defendant set fire to the grass; plaintiff's wife, in order to save the house, attempted to put the fire out and was burned to death. Her death was a proximate result of defendant's act.[54]

Defendant, while driving a horse in the street, suddenly and negligently pulled around to avoid a coming vehicle; plaintiff, jumping out of the way of defendant's horse, got in the way of the other vehicle and was injured. This injury was a proximate result of defendant's act.[55]

There are very few authorities in conflict with the mass of cases supporting this proposition. One or two may be noticed.

Cox C. C. 138 (1882), where in a similar case the praiseworthy motive of the actor seems to have protected him from punishment.

[50] Scott *v.* Shepard, 2 W. Bl. 892 (1773).

[51] Jones *v.* Boyce, 1 Stark. 493, 495 (1816). Lord Ellenborough, C. J., said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

[52] Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223 (1838).

[53] Clark *v.* Chambers, 3 Q. B. D. 327 (1878).

[54] Illinois Central R. R. *v.* Siler, 229 Ill. 390, 82 N. E. 362 (1907).

[55] Boggs *v.* Jewell Tea Co., 263 Pa. 413, 106 Atl. 781 (1919).

Defendant wrongfully erected a levee. A number of those whose land was flowed cut the levee, flooding plaintiff's land below. The court held the result remote.[56]

Defendant started a prairie fire; plaintiff in attempting to put it out by a back-fire was burned. The injury was remote from defendant's act.[57] This was a decision by the notorious Robinson, J. His language on this point is worth quotation:

"When the fire was started, it was not subject to the control of any person, and it behooved all persons to keep out of its way. 'No man is responsible for that which no man can control.' Maxims (Comp. Laws 1913, § 7260). Even if defendant was negligent in permitting the fire to escape from his land, he was liable only for the proximate loss, and not for a death resulting from a person rushing into or in front of an onrushing flame. Such a loss is too remote."

Comment is unnecessary.

The intervening person may be a third person, acting either of his own motion or by employment of the person whose rights are in danger.

Defendant placed some one in danger of death; plaintiff was injured in an attempt to save him; the injury is a proximate consequence of defendant's act.[58]

Defendant negligently set fire to a child's clothes; the child's mother burned her hands while extinguishing the flame. This was a proximate result of defendant's act.[59]

Defendant wrongfully filled plaintiff's cellar with explosive illuminating gas; plaintiff sent a plumber into the cellar to find the leak. The plumber lit a match to find the leak, and the gas exploded, damaging plaintiff's house; this was a proximate result of defendant's act.[60]

This is the basis of the responsibility of the person causing a personal injury for the act of a physician or surgeon in attempting to cure the wound.

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[56] Bentley *v.* Fischer L. & M. Co., 51 La. Ann. 451, 25 So. 262 (1899).

[57] Hogan *v.* Bragg, 170 N. W. (N. D.) 324 (1918).

[58] Eckert *v.* Long Island R. R. Co., 43 N. Y. 502 (1871); Bond *v.* Baltimore & O. R. R., 96 S. E. (W. Va.) 932 (1918).

[59] Wichita F. T. Co. *v.* Hibbs, 211 S. W. (Tex. Civ. App.) 287 (1919).

[60] Burrows *v.* March Gas Co., L. R. 5 Ex. 67 (1870).

Defendant wounds plaintiff, who calls a physician to cure him; the physician, whether carefully or negligently, does an act which injures plaintiff; this is a proximate result of the wound.[61]

It is to be noted that the defendant is responsible for the physician's act only if that act is *bonâ fide* intended as an attempt to cure the harm inflicted by defendant. If the physician should seize the opportunity to experiment, or maliciously to harm the victim, the defendant's act would not cause the physician's. In the Bush case[62] the attending physician communicated scarlet fever to the defendant's victim. This was held not a proximate consequence of defendant's act. Nor is defendant responsible for a mistake of a nurse, employed to carry out the directions of the physician, who administers a wrong and harmful remedy.[63]

The defendant by his attack upon another may cause the person attacked (or that person's husband) to act in defense, and thereby be the proximate cause of the direct result of such action.

An assured person made an attack upon a woman; her husband in her necessary defense killed him. The assured person caused his own death.[64]

Defendant attacked a railroad train to rob it; defensive shots from the train killed a third person; defendant is a proximate cause of the death.[65]

Defendant joined in an attack upon an armory; soldiers stationed in the armory fired defensively into the mob, and killed a bystander. Defendant upon this ground should have been held a proximate cause of the death; but the court, in a questionable decision, held that he was not so.[66] The decision was not *in banc*, but at the trial of the case.

There is one state, however, which seems not to have accepted the doctrine of the cases just considered. In Pennsylvania, in cases

[61] Com. *v.* Hackett, 2 All. (Mass.) 136 (1861); Purchase *v.* Seelye, 231 Mass. 413, 121 N. E. (Mass.) 413 (1918); Hooyman *v.* Reeve, 168 Wis. 420, 170 N. W. 282 (1919).

[62] Bush *v.* Com., 78 Ky. 268 (1880).

[63] Thompson *v.* Louisville & N. R. R., 91 Ala. 496, 8 So. 406 (1890).

[64] Bloom *v.* Franklin L. I. Co., 97 Ind. 478 (1884).

[65] Keaton *v.* State, 41 Tex. Cr. R. 621, 57 S. W. 1125 (1900). Defendants were forcing this person to accompany them; but the court was willing to decide the case without relying upon that additional fact.

[66] Com. *v.* Campbell, 7 All. (Mass.) 541 (1863). The decision has unfortunately been followed. Butler *v.* People, 125 Ill. 641, 18 N. E. 338 (1888); Com. *v.* Moore, 121 Ky. 97, 88 S. W. 1085 (1905).

of every sort, the courts have usually refused to regard the direct result of an active force as proximate unless it is foreseeable.

An engine on defendant's railroad negligently hit a woman at a crossing and threw her body against plaintiff, injuring him; this was held to be a remote result of hitting the woman.[67]

In one case, however, the Pennsylvania court has dealt with this subject as it would have been dealt with in states following the general rule.[68] The facts in that case were these: A spur track left the main track and joined it again a hundred feet farther on. The engineer of a small locomotive on the spur track carelessly ran into a passing passenger train. Just before the collision he reversed his engine, then closed the throttle and jumped out. The force of the collision threw the throttle open and the locomotive backed along the spur track and collided with the passenger train at the other end of the track, which the train had just reached, injuring plaintiff. The court held that the injury was a proximate consequence of the negligent collision. The court said:

"The engineer would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable."

V

If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risked loss, we say that the injury thereby created is a proximate consequence of the defendant's act.

A sick seaman was sent aloft by the master of the vessel, it being apparent that he was in danger there; the seaman by reason of his weakness fell overboard. This was a proximate result of the master's act.[69]

Defendant undertook to carry plaintiff to San Francisco by way of

[67] Wood *v.* Pennsylvania R. R. Co., 177 Pa. 306, 35 Atl. 699 (1896).

[68] Bunting *v.* Hogsett, 139 Pa. 363, 21 Atl. 31, 33, 34 (1891).

[69] United States *v.* Freeman, 4 Mason (U. S.) 505 (1827).

the Isthmus, but delayed and finally abandoned transportation on the Isthmus, leaving plaintiff in an unhealthy climate. Plaintiff contracted fever. This was a proximate result of defendant carrying plaintiff to the Isthmus and no further.[70]

Defendant wrongfully let down the bars of a pasture where plaintiff's sheep were kept; the sheep wandered out and were eaten by bears. If the jury found that the wandering of the sheep to where bears were was a danger of the situation, they should find for plaintiff.[71]

Defendant built an embankment across land of plaintiff with insufficient provision for carrying off the water of a river. In a flood the water was banked up against the embankment, and finally broke through and injured plaintiff's land below. This was a proximate result of building the insufficient embankment.[72]

Defendant sent plaintiff into a tank filled with gasoline vapor; plaintiff was given an electric lamp on the end of a cord to light up the tank. The lamp was broken against the side of the tank, and the resulting spark exploded the vapor, injuring plaintiff. The court, finding that such an event should have been foreseen, held the result proximate.[73]

Defendant sold and delivered a jug of sulphuric acid not labeled as poison; the purchaser put it where plaintiff drank it, believing it to be buttermilk, and was poisoned; defendant was a proximate cause.[74]

A manufacturer sold a loaded rifle as unloaded; it was accidentally discharged and injured plaintiff; the injury was a proximate result of the manufacturer's act.[75]

On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act.

Defendant threw a skin out of a window, and it came to rest upon the ground. A wind later lifted the skin from the ground, and it was thrown against plaintiff and injured him. The injury was not a proximate result of the defendant's act.[76]

Defendant railroad put plaintiff, a passenger, off the train at the wrong station; she was forced to spend the night at a hotel there, and

[70] Williams *v.* Vanderbilt, 28 N. Y. 217 (1863).
[71] Gilman *v.* Noyes, 57 N. H. 627 (1876).
[72] Zollman *v.* Baltimore & O. S. W. R., 121 N. E. (Ind. App.) 135 (1918).
[73] Standard Oil Co. *v.* Allen, 121 N. E. (Ind. App.) 329 (1918).
[74] Burk *v.* Creamery P. M. Co., 126 Iowa, 730, 102 N. W. 793 (1905).
[75] Herman *v.* Markham A. R. Co., 258 Fed. 475 (1918).
[76] Rex *v.* Gill, 1 Stra. 190 (1719).

was injured by the explosion of a lamp in her room. The injury was not proximate to defendant's act.[77]

The form of rule above stated is believed really to state the true distinction, and the one actually enforced by the courts. The wording of it, however, is not that ordinarily used. The commonest phrase, probably, is that the injury shall be the natural and probable result of the act; a phrase which involves at least a misuse of both adjectives. A more accurate phrase, which is gaining in use, is that the intervening force, unless it is to make the result remote, must be foreseeable. This phrasing is not far from accurate; but it leads to a wrong result in one class of cases, soon to be considered.

It will be noticed that in cases of the sort under discussion the jury must usually be called upon to solve a difficult problem: whether a risk was created by the defendant, or, as it is usually phrased, whether the result (or more accurately, the intervening force) was foreseeable. In the cases heretofore considered, there was seldom a disputed fact to be left to the jury. Given the causation of the second force by the first, seldom a matter of doubt, the proximity was a mere question of law. In the cases now under examination, however, the question of risk is usually one of doubt, the answer to which must be found by the jury. Much, therefore, depends upon how the question comes up. Does it arise on a demurrer to the evidence, or an exception to the direction of a verdict or to the failure to direct one? The question then is, whether on the facts as given the jury could properly find a risk—not what the court would find. On the other hand, if the case has gone to the jury, the only question can be, Is there reason to disturb the verdict? In the first case the Appellate Court must reverse the proceedings if there is a case for the jury; in the second case, it must affirm proceedings. In neither case is the Appellate Court at liberty to express its own idea of the facts.

This distinction, as well as the general rule, may be illustrated by the following cases.

(*a*) Cases where the jury should have been allowed to find a verdict; a directed verdict, or a demurrer to the evidence, was set aside.

Defendant turned a stream of water on the sidewalk in freezing

[77] Central of Georgia Ry. *v.* Price, 106 Ga. 176, 32 S. E. 77 (1898).

weather; a passer-by slipped on the ice thereby caused, and was injured.[78]

Defendant fails to light a staircase in a tenement house, as he was legally obliged to do; plaintiff, a tenant, fell down stairs in the dark and was injured. This is a proximate result of the defendant's breach of duty.[79]

Defendant negligently left a service pipe with an open end under plaintiff's house and turned on odorless illuminating gas; plaintiff went under the house with a match to examine a supposed leak in a water pipe, and was injured by an explosion. This was held a proximate result of defendant's act.[80]

In case of the creation of a dangerous situation by failure to protect a dangerous structure the jury should pass on the question. So of imperfect insulation of electric wire at a point where persons might come in contact with it;[81] disrepair of a lever for stopping a machine dangerous to workmen;[82] failure to keep wall of shooting-gallery tight enough to prevent glancing bullets;[83] failure to light a structure within a railroad right-of-way at night;[84] failure to place a light upon a pile of bricks near a sidewalk.[85]

The defendant negligently struck the plaintiff, a police officer, and broke his leg; while convalescent and on crutches his crutch slipped, and he fell, breaking his leg a second time. The court held that the jury might find that his condition created a risk of this fall, or in the language of the court that the second fracture was a natural and probable result of the original injury.[86]

On the other hand, a demurrer to the evidence was allowed by the Supreme Court of Canada in a case which might well have gone to the jury. The defendant, a telephone company, wrongly extended a "guy wire" from its pole, which stood on the highway line, about four feet into the highway. The place into which it was extended was a grassed

[78] Cochran *v.* Barton, 233 Mass. 147, 123 N. E. 505 (1919).

[79] Tannenbaum *v.* Lindenberg, 105 Misc. 307, 173 N. Y. Supp. 68 (1918).

[80] Hahn *v.* Southwestern Gas Co., 82 So. (La.) 199 (1919).

[81] Olm *v.* New York & Q. E. L. & P. Co., 188 App. Div. 19, 176 N. Y. Supp. 370 (1919).

[82] P. Bannon P. L. Co. *v.* Page, 183 Ky. 367, 209 S. W. 4 (1919).

[83] Larson *v.* Calder's Park Co., 180 Pac. (Utah) 599 (1919).

[84] Norfolk & W. Ry. *v.* Whitehurst, 99 S. E. (Va.) 568 (1919).

[85] Sutter *v.* Metropolitan St. Ry., 208 S. W. (Mo. App.) 851 (1918).

[86] Hartnett *v.* Tripp, 231 Mass. 382, 121 N. E. 17 (1918). The court did not mention the cases of Wineberg *v.* Du Bois, 209 Pa. 430, 58 Atl. 807 (1904), or Snow *v.* New York, N. H. & H. R. R., 185 Mass. 321, 70 N. E. 205 (1904), in which the defendant was held not liable for consequences where a fall intervened. The latter case is probably distinguishable.

"bank" about six inches higher than the roadway. The plaintiff was driving along the road when his team became frightened and ran, swung up on the grass, caught the wheel on the wire, and threw out the plaintiff.[87] It is submitted that the case should have been given to the jury.

(*b*) But where the case is regarded as so clear that a jury could not be allowed to find a verdict for the plaintiff, the court has held it proper to direct a verdict for the defendant.

A workman attempted to alight from a slowly moving car, and his clothing was caught by a bolt on the car so that he was carried along against his will and struck and hurt a fellow workman who at his order had previously stepped out and was walking alongside the car. The court held that this was not a proximate result of the order to leave the car. Whether it was a proximate result of the defendant's attempt himself to leave the car is a closer question, though it would probably be decided in the same way.[88]

Defendant blocked a public way by wrongfully leaving a wagon standing in it; plaintiff, driving through, was injured in attempting to get by the wagon; this is not a proximate result of defendant's act.[89]

This principle is or may be relied upon in cases where the lack of safety device or protection required by statute or ordinance is a proximate cause of an injury by failure of the protection; since the requirement proves the danger to exist, and the finding of a jury is unnecessary.[90]

(*c*) If the court itself passes on the facts, as it does in admiralty, this distinction is of course not applicable.

Defendant maintained a bridge with a swinging draw; a vessel gave the signal to pass through the draw; the persons employed to open the draw were unreasonably slow, so that it did not swing quite clear of the vessel, which hit the draw so as to increase its speed. The employees then failed to stop the draw at the proper place, so that it swung by and hit the vessel again as it was leaving the draw, injuring it. The court of Admiralty passed upon the whole question, drawing inferences of fact, and held that this injury was a proximate result of defendant's unreasonable delay in opening the draw, and of its failure to stop it.[91]

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[87] Eberhardt *v.* Glasgow M. T. Assoc., 91 Kan. 763, 139 Pac. 416 (1914).

[88] Woodward Iron Co. *v.* Gamble, 81 So. (Ala.) 810 (1919).

[89] Davis *v.* Mellen, 182 Pac. (Utah) 920 (1919).

[90] Fence around an excavation: Johnson *v.* Denison, 173 N. W. (Iowa) 46 (1919); Fernald *v.* Eaton, 180 Pac. (Cal. App.) 944 (1919). Fence around an area way (verdict directed for plaintiff): Rose *v.* Gunn Fruit Co., 211 S. W. (Mo. App.) 85 (1919).

[91] New England F. &. T. Co. *v.* Boston, 257 Fed. 778 (1919).

It has been argued that the mere fact of the new force being foreseeable will not make the result proximate to defendant's act; it is so only where the risk of the new force was created or increased by the act. This is believed to be the rule upon which the courts actually proceed.

The application of the rule can best be studied in the actual decisions.

If the injury takes place by an active force which was threatening at the time of defendant's acting, the danger of which was not increased by defendant's action, in spite of the fact that he foresaw its operation, he has added no active danger to the situation and the loss does not result proximately from his act.

So where a railroad improperly delays carriage, and then starts it again, and in later crossing a flood-plain the goods are destroyed by a flood, the chance of which was as great at the time the goods should have been at the place as at the time they were there, the delay should not be regarded as a proximate cause of the flood.[92]

These cases gave rise to a long controversy not yet settled; the authorities are still divided. They are collected in *Green-Wheeler Shoe Co.* v. *Chicago, R. I. & P. R.*[93]

A little care in the analysis of the situation will make the above statement plain. The railroad has done two things, either of which might conceivably be the foundation of liability:

1. It has wrongfully ceased to carry; a failure to do what by law it ought to do. This, however, so far from causing the loss, would absolutely prevent it, unless the delay is itself in a dangerous place; if so, the carrier is liable for the danger overtaking it there.

2. It has started the goods on again after the delay, and kept them going. If at this time the foreseeable danger were greater than at the time the delay began, it is admitted that this would be a proximate cause of the loss; but if not, the danger was one that the carrier was bound to run in the carriage of the goods. In fact, under such circumstances (assuming he was justified at the beginning in receiving the goods to be carried, *i. e.*, that the danger was not a serious one and unknown to the shipper) the carrier

[92] Denny *v.* New York Central R. R., 13 Gray (Mass.) 481 (1859). *Contra*, Michaels *v.* New York Central R. R., 30 N. Y. 564 (1864).

[93] 130 Iowa, 123, 106 N. W. 498 (1906); 1 SEDGWICK ON DAMAGES, 9 ed., §§ 119-119e.

would be violating its duty to the shipper if it did not carry the goods on.

If, however, there is no special danger at any particular point, but a constant risk of carriage which is necessarily increased by delay, the delay, since it causes the prolongation of the carriage, is a proximate cause of the loss due to the risk.[94]

The doctrine of "attractive nuisance," so called, is one of the law of Torts no less than of Causation; but it involves a causative element. One who leaves a thing which attracts children to play with it, in a place where children can get it, thereby creates a situation of active danger; and if the act of the child brings about a catastrophe, it is a proximate result of leaving the thing about.

Defendant left an unlocked push-car near its railroad where children could get at it; a child pushed it on the track and was killed by a train. If the act of a child could have been foreseen, defendant is a proximate cause of the death.[95]

This doctrine is the basis of the explosives cases. Defendant gives a child a pistol, explosive cap, or something which by exploding would cause injury, or leaves it in the child's way; he is a proximate cause of any injury the child may do with it, so long as it remains in his hands.[96]

It is to be noticed that if the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it.[97]

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[94] Risk of freezing in winter: Fox *v.* Boston & Me. R. R., 148 Mass. 220, 19 N. E. 222 (1889); O. J. Barnes Co. *v.* Northern Pac. Ry., 173 N. W. (N. D.) 943 (1919). Risk of forest fire in summer: Bell Lumber Co. *v.* Bayfield T. Ry. Co., 172 N. W. (Wis.) 955 (1919). Risk of chilling live-stock: Strother *v.* Atchison, T. & S. F. Ry., 212 S. W. (Mo. App.) 404 (1919); Smart *v.* Oregon Short Line R. R., 183 Pac. (Utah) 320 (1919).

[95] Follett *v.* Illinois Cent. R. R., 288 Ill. 506, 123 N. E. 592 (1919).

[96] Binford *v.* Johnston, 82 Ind. 426 (1882); Chaddock *v.* Plummer, 88 Mich. 225, 50 N. W. 135 (1891); Anderson *v.* Newport Mining Co., 202 Mich. 204, 168 N. W. 523 (1918); Lubbock *v.* Bagwell, 206 S. W. (Tex. Civ. App.) 371 (1918). In Hale *v.* Pacific Tel. & Tel. Co., 183 Pac. (Cal. App.) 280 (1918), the courts said that there was nothing in the evidence to show that the defendant could anticipate that a child would come upon its premises and get the explosive where it was kept; if there were such evidence, the jury might find the result proximate.

[97] Chaddock *v.* Plummer, 88 Mich. 225, 50 N. W. 135 (1891); Pittsburg Reduction Co. *v.* Horton, 87 Ark. 576, 113 S. W. 647 (1908).

It is often said that where a criminal, or as it is often put, an illegal act of another, intervenes after the defendant's act, the latter ceases to be a proximate cause.

Defendant wrongfully left open a gap in the plaintiff's basement wall: thieves entered and stole plaintiff's goods. Defendant was not a proximate cause.[98]

Defendant wrongfully let a dangerous criminal escape; he was not a proximate cause of the injury done by the criminal, and foreseeable at the time of the escape.[99]

This was a principal ground for holding the Cunard Steamship Company not liable for injuries suffered from the sinking of the Lusitania.[100]

In spite, however of much authority to this effect, the statement must be regarded as exceedingly questionable. If an employee of a storage warehouse should leave a window open, it is submitted that the stealing of the goods would be a proximate result.

In all cases where the act or failure to act of the plaintiff himself was a factor, he might in a civil suit be barred of his recovery by his own contributory negligence. Where this is the case it has often been said that the result is remote. But so to say is to confuse two very different things. That there may be proximate causation, though the injured person is contributorily negligent, is shown in criminal cases, where contributory negligence of the injured person is no bar.

Defendant wounded X's finger; X refused to have the finger amputated, though the surgeon urged it, got lockjaw and died. The death was a proximate result of defendant's act.[101]

A neglect of this principle led to what is submitted is a wrong result. Defendant, a carrier by automobile for hire, negligently failed to stop at plaintiff's house, and plaintiff negligently jumped out of the moving car and was injured. The defense of contributory negligence had been abolished by statute. The court held the injury a remote consequence of defendant's failure to stop.[102]

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[98] Andrews *v.* Kinsel, 114 Ga. 390, 40 S. E. 300 (1901).

[99] Hullinger *v.* Worrell, 83 Ill. 220 (1876); Henderson *v.* Dade Coal Co., 100 Ga. 568, 28 S. E. 251 (1897).

[100] The Lusitania, 251 Fed. 715 (1918).

[101] Reg. *v.* Holland, 2 Moo. & Rob. 351 (1841).

[102] Dantzler S. & D. D. Co. *v.* Hurley, 119 Miss. 473, 81 So. 163 (1919).

To sum up the requirements of proximity of result:

1. The defendant must have acted (or failed to act in violation of a duty).

2. The force thus created must (*a*) have remained active itself or created another *force* which remained active until it directly caused the result; or (*b*) have created a new active *risk* of being acted upon by the active force that caused the result.

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